

KENDALL'S CONCERNED AREA RESIDENTS

IBLA 90-112

Decided April 15, 1994

Appeal from a decision of the Lewistown, Montana, District Office, Bureau of Land Management, recommending that the Montana Department of State Lands approve an application to amend Montana State Operating Permit No. 00122 and Federal plan of operations M-77777.

Set aside and remanded.

1. Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

In order to have standing to appeal, an appellant must be both a party to the decision appealed and adversely affected by the decision. An organization which has not participated in the process for reviewing an EA is not a party to the case and therefore lacks standing to appeal.

2. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Surface Management--National Environmental Policy Act of 1969: Environmental Statements

BLM prepares an EA to evaluate both whether approval of a plan of operations would constitute a major Federal action significantly affecting the quality of the human environment and whether mitigation measures and reclamation procedures are adequate to prevent unnecessary and undue degradation of the public lands and their resources. A finding that a plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause significant environmental effects requiring preparation of an environmental impact statement.

3. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Coordination with State and Local Governments--Federal Land Policy and Management Act of 1976: Plan of Operations--

National Environmental Policy Act of 1969: Environmental Statements

Where BLM finds, based on an EA prepared by a state agency, that approval of a plan of operations will not cause significant impact to the quality of the human environment, the record must show that BLM critically reviewed the EA in relation to the plan of operations, took a hard look at the relevant areas of environmental concern, considered mitigation measures, and independently reached a reasoned conclusion that significant impact will not occur. Absent documentation of BLM's independent review and finding of no significant impact, the Board cannot conclude that BLM has complied with NEPA.

4. Environmental Policy Act--Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Surface Management--National Environmental Policy Act of 1969: Environmental Statements

To determine whether approval of a plan of operations will cause unnecessary or undue degradation to public land, BLM is required to consider, in relation to operations of similar character, the extent of surface disturbance and the effects on resources and land use both within and outside the area of operations. Where an EA does not analyze whether there will be unnecessary or undue degradation, and other documentation does not show that BLM conducted the required review and came to a reasoned conclusion, the record does not support a decision that the plan of operations was adequate to prevent unnecessary and undue degradation of public lands.

5. Endangered Species Act of 1973: Section 7: Generally

Where BLM determines that an action will not affect endangered or threatened species or their habitat, the Endangered Species Act does not require consultation with the U.S. Fish and Wildlife Service unless requested by that agency. A finding that an action will not jeopardize endangered or threatened species will not be affirmed unless it is a reasoned conclusion based upon facts of record.

APPEARANCES: Thomas France, Esq., Missoula, Montana, for Kendall's Concerned Area Residents and National Wildlife Federation; Michael S. Lattier, Esq., Helena, Montana, for Kendall Venture; Karan L. Dunnigan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Kendall's Concerned Area Residents (KCAR) has appealed the October 31, 1989, decision of the District Manager, Lewistown, Montana, District Office, Bureau of Land Management (BLM), recommending that the Montana Department of State Lands (DSL) approve the application of Kendall Venture (KV), for an amendment of "state Operating Permit No. 00122 and federal Plan of Operations M-77777." 1/

BLM's decision was based on its review of KV's three-volume "Amendment to Hard Rock Operating Permit #00122" application (AOP) dated February 10, 1989, which DSL had required KV to submit when it approved a previous amendment, as well as on DSL's "Final Environmental Assessment, Comprehensive Life-of-Mine Amendment" (EA) dated September 1989, which found that an environmental impact statement (EIS) was unnecessary under State law. The amendment was sought to allow KV to expand its open pit gold mine in the North Moccasin Mountains of Fergus County, Montana, from 293 acres to 1,185 acres and produce 8 to 11 million tons of ore over 8 years.

On December 27, 1989, KV filed a motion to intervene in KCAR's appeal. By order dated January 9, 1990, we allowed KV to intervene as a respondent due to its obvious interest as the proponent of the challenged plan of operations.

On January 31, 1990, the National Wildlife Federation (NWF) filed a motion to intervene. Both BLM and KV opposed the motion, arguing that NWF was not a party to the case. By order dated February 28, 1990, we took the motion under advisement. On March 23, 1990, NWF filed a brief and affidavits in support of its motion to intervene. KV responded on April 12, 1990, and also filed an objection to consideration of the statement of reasons (SOR) which NWF had filed on February 8, 1990, and a "Responsive Statement of Reasons" filed jointly by NWF and KCAR on March 19, 1990.

In their answers, both BLM and KV also challenge KCAR's standing to bring the appeal. On March 23, 1990, KCAR filed a "Statement of Standing" supported by affidavits by several of its members.

1/ By letter dated Feb. 23, 1989, BLM acknowledged that it had received KV's "Plan of Operations for mine expansion in the North Moccasin Mountains" and had assigned the application serial number M-77777. The record does not indicate that KV had previously obtained Federal approval of a plan of operations. Because BLM's decision recommended State approval rather than granting Federal approval, it appears that M-77777 identifies only the "application" file and is not a permit number.

The record also contains a copy of "Kendall Venture North Moccasin Project Amendment to Operating Permit 00122 Fergus County, Montana" dated May 30, 1989, which bears the notation "MTM-77777 Copy #1," but this amendment does not appear to have been addressed in the decision on appeal.

Although mining claims were located in the North Moccasin Mountains in the 1880's, significant development did not occur until a cyanide mill was built by Harry T. Kendall in 1900 (AOP, App. E at 1). A number of other mines were subsequently developed, most or all using cyanide treatment mills, and fairly active operations continued into the early 1920's. Id. at 1-3. More limited mining continued through the 1930's and in 1940 all properties became consolidated in a single owner. Id. at 3. Mining ceased in 1943 pursuant to Government Order L-208 as non-essential to the war effort. Approximately 106 acres disturbed by mining activity during this period are within the amended permit boundary, including "large areas of tailings, open cuts, disturbed areas, haul roads and a few remaining small structures." Id. at 7; EA at 12.

Current mining at the site began with the 1984 issuance of Operating Permit No. 00122 to Triad Investments and was continued until 1987 by Greyhall Resources (AOP at 2-1). Approximately 200,000 tons of ore and over a million tons of waste were mined under the permit. Id. KV assumed control of the permit in 1987 and through July of 1989 mined an additional million tons of ore and approximately 6.8 million tons of waste. Id. Under the proposed amendment, the permit boundary was to "include 1,185 acres encompassing four open pit mining areas, one heap leach facility, three waste dumps, topsoil stockpiles, haul roads and all associated facilities and disturbances." 2/ Id.; EA at 1. Yearly production was to be 1 to 1.5 million tons of ore and up to 6 million tons of waste, with a total production of 8 to 11 million tons of ore (AOP at 1-1, 2-1, 2-5). The approximately 48 million tons of waste rock was to be conveyed to three of the four existing dumps (EA at 14).

The amendment calls for gold and silver to be obtained from the ore by agglomeration, heap leaching with cyanide using a "valley fill" method, and Merrill-Crowe precipitation (AOP at 2-2). The precipitate is fluxed and smelted on site to produce gold-silver dore bars for sale to a refinery. Id. The operation is described by KV as follows:

Run-of-mine ore is stockpiled, crushed and agglomerated at the rim of the basin and delivered down into the valley and on to the pad by haul trucks or a conveyor belt system. Stacking is done using a radial stacker system. Cyanide is applied to the heap using spray or drip irrigation. A lined pond for collecting pregnant solution is constructed at the foot of the valley. Pregnant liquor is pumped to the Merrill Crowe recovery plant and barren solution gravitates back to a barren pond for cyanide makeup and pumping back to the leach pad.

2/ The lands within the permit boundary include portions of secs. 29, 30, 31, and 32, T. 8 N., R. 18 E. and sec. 6, T. 17 N., R. 18 E., at the 4,700-foot elevation on the east slope of North Moccasin Mountain.

Id. Facilities at the site include the leach pad, process and fresh water ponds, crushing and agglomeration facility, process plant, and office, lab, and warehouse space. Id.

A key feature of the proposed amendment is the construction of leach pad 4 and associated ponds. Under previous ownership the mine operated using leach pads 1 and 2 with a capacity of 43,000 tons and 290,000 tons respectively (AOP at 2-1). These pads have been decommissioned and partially reclaimed (EA at 14). KV constructed pad 3 with a capacity of 1.7 million tons under a prior amendment to the operating permit (AOP at 2-1). Pad 4 was to be built in stages with an eventual projected capacity of 8.9 million tons. Id. at 2-15; EA at 11, 14. A new "pregnant pond" with a capacity of 5.6 million gallons (pond 7) and an overflow pond with a capacity of 8.5 million gallons (pond 8), to also be used as a fresh water pond, were to be constructed below pad 4 (EA at 18). Process solutions were to be pumped from pond 7 to the existing processing plant located above pad 4 and barren solution sent to pond 3, also above pad 4, to be refortified with cyanide and pumped to the leach pad spray network. Id. Pad 4 and ponds 7 and 8, along with power and conveyor lines, were projected to occupy 60.5 acres (AOP 2-6; EA at 12). If fully expanded, pad 4 would abut pad 3 and occupy the area now covered by ponds 4, 5, and 6 (EA at 18). Pond 3 would be moved above its present location and upgraded. Id.; AOP at 2-24.

Of the 530 acres to be disturbed by the operation, the reclamation plan calls for KV to reclaim 368 acres, including most of the 106 acres disturbed by early mining operations (EA at 8). "The remaining 162 acres comprise the four mine pits which are essentially exempt from reclamation under the [Montana] Metal Mine Reclamation Act." Id. KV, however, has proposed to partially reclaim the pits depending upon their eventual depth (EA at 8, 30). Waste rock dumps would be graded, covered with topsoil, and planted with grasses for grazing on top and trees with a grass, forb, and shrub understory on the sides (EA at 29-30). Leach pads would be neutralized and the plastic liner drilled through for drainage and surfaces graded, topsoil replaced, and grasses and forbs planted, except for the slopes of leach pad 4 which would be reforested (EA at 30). Ponds would also be neutralized, the sludge cemented with liners folded in, the embankments bulldozed into the area, topsoil replaced, and grasses and forbs planted (EA at 30). Diversion ditches and sedimentation traps would be backfilled, roads reclaimed, and all buildings removed with compacted areas treated and revegetated (EA at 31).

After receiving KV's proposed amendment, BLM and DSL undertook completeness reviews, received public comments, and sent comments and questions to KV. KV submitted responses and revisions to the plan. A draft EA was issued in June 1989. BLM sent KV comments on the draft EA under cover letter dated July 26, 1989. By letter of the same date, the Environmental Protection Agency (EPA) informed BLM of matters in the draft that it believed needed additional work and supporting documentation (NWF SOR, Exh. 2). DSL issued another completeness review on September 13, 1989, and KV again submitted responses and modifications to the proposed plan. The final EA was

issued under cover letter dated September 29, 1989. On October 27, 1989, KV submitted additional revisions to the plan of operations. In a letter to BLM and DSL dated October 30, 1989, EPA identified various matters it found needed more complete coverage in the final EA and set forth four reasons it believed possible consequences of the proposed expansion could have supported preparation of an EIS (NWF SOR, Exh. 3 at 3). DSL approved the proposed amendment with six stipulations on November 1, 1989 (BLM Answer, Exh. C).

KCAR contends that BLM has not properly carried out its responsibilities under the surface management regulations at 43 CFR Subpart 3809. It also claims that BLM's finding that approval of the amendment will not cause unnecessary or undue degradation is not supported by information either in the EA or the proposed amendment (SOR at 1). KCAR raises a number of the environmental issues it identified in the review process which it believes BLM did not adequately address. It is most concerned about the effect of KV's operation on the quality and quantity of local water supplies. In particular, KCAR contends that the EA lacks sufficient information about the risk of cyanide leaks, the effects of water consumption at the mine, contamination of groundwater which feeds springs, the loss of runoff water, the adequacy of diversion ditches to contain runoff during major storms, the placement of leach pad 4 and its liner below groundwater level, the pad's stability if the under-drain fails, and the danger of cyanide contamination due to runoff from stockpiled and replaced topsoil (SOR at 2-3).

KCAR raises a number of other issues. It contends that BLM's conclusion that visual impacts will be insignificant is unjustified because it is not based on quantified information. It asserts that bald eagles are known to frequent the area and claims that BLM has failed to comply with section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1988), and that the EA does not adequately address impacts upon elk and other wildlife. KCAR complains that KV was allowed to submit revisions to the proposed amendment after the public comment period had ended and the changes were not readily available to KCAR. KCAR argues that the EA is deficient for failure to note disputed land ownership and to address effects upon a proposed fish farm. Finally, KCAR expresses concern that the EA does not adequately address the potential for air pollution.

NWF's SOR amplifies many of the same matters raised by KCAR. Thus, NWF argues that BLM violated the National Environmental Policy Act of 1969 (NEPA) by unreasonably deciding not to prepare an EIS, by failing to provide public access to information, and by failing to prepare a record of decision and finding of no significant impact (FONSI) as required by 40 CFR 1501.4(e) and 1506.1 (NWF SOR at 10-14).

BLM and KV respond that BLM's affirmation of DSL's finding that an EIS is not required meets the standard of review set forth in G. Jon & Katherine M. Roush, 112 IBLA 293 (1990), and Sierra Club, Inc., 107 IBLA 96 (1989), in that the decision-making process was reasoned and BLM considered all significant environmental concerns (KV Answer at 8-10; BLM Answer at 5).

They argue that KCAR has failed to show error of law or fact in the decision and believe that the allegations and concerns raised by KCAR simply reflect a difference of opinion. In support, they address each of the matters raised by KCAR.

As noted above, KCAR and NWF jointly filed a response to the answers filed by KV and BLM. It renews and expands upon the primary arguments raised in their statements of reasons. BLM has filed a rebuttal to it.

BLM's decision was made pursuant to a memorandum of understanding (MOU) between BLM and DSL (BLM Answer, Exh. B). BLM's decision states:

Under the MOU BLM has two specific areas of responsibility; compliance with section 106 of the National Historic Preservation Act; and compliance with section 7 of the Endangered Species Act.

BLM has participated in the review of Kendall Venture's Plan of Operations, and in preparation of the environmental assessment. We are satisfied that the plan is in compliance with the above mentioned acts.

In addition, BLM has determined that the Plan of Operations, as revised during the review process, is adequate to prevent unnecessary and undue degradation of the involved federal lands as required by 43 CFR 3809.1-6.

BLM's decision offers no supporting rationale for its findings that the plan of operations is in compliance with governing statutes and regulations.

KCAR argues that BLM's statement that the amended plan of operations will be "adequate to prevent unnecessary and undue degradation of the involved federal lands" shows that BLM failed to meet the broader objective set forth in 43 CFR 3809.0-2 of preventing "unnecessary or undue degradation with respect to mineral operations" (SOR at 1). KCAR also contends that 43 CFR 3809.1-6 requires BLM "to provide a thorough and competent review of the mine plan and EA" and that BLM has failed to enforce the requirement of 43 CFR 3809.3-1 that a plan of operations comply with all Federal and State laws (SOR at 5).

[1] We first consider the motions to dismiss for lack of standing. In order to have standing to appeal, an appellant must be both a party to the decision appealed from and adversely affected by the decision. Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299, 306, 97 I.D. 109, 112-13 (1990); In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982); see 43 CFR 4.410(a). To be adversely affected, an appellant must have a legally recognizable interest in the land at issue. Melvin Helit v. Gold Fields Mining Corp., supra at 306, 97 I.D. at 113; Scott Burnham, 100 IBLA 94, 119-20, 94 I.D. 429, 443 (1987). The interest need not be an economic or a property interest; use of the land involved or ownership of adjoining land

suffices, but mere interest in a problem or concern with the issues involved does not. Dorothy A. Towne, 115 IBLA 31, 34 (1990); Mark S. Altman, 93 IBLA 265, 266 (1986).

KCAR is a party to the case. Its members participated in review of the EA prior to issuance of BLM's decision. KCAR has also asserted the necessary adverse effects. Its members have alleged interests as adjoining or nearby landowners, including possible stream contamination, loss of surface water, sediment washing onto adjoining property, and impairment of visual enjoyment of the North Moccasin mountain landscape and wildlife (affidavits accompanying Statement of Standing). Appellants additionally allege there has been a history of cyanide contamination of groundwater and that "the operations are situated in a major recharge area for the Madison limestone, one of the area's main aquifers," potentially affecting springs and reservoirs in the area (Affidavit of Alan Shammel, Mar. 14, 1990, at 4). Accordingly, KCAR has standing to appeal the decision, and the motions to dismiss its appeal are denied.

NWF, however, has failed to establish that it is a party to the case. There is no evidence that either NWF or its members participated in the process of preparing and reviewing the EA. We are, therefore, unable to consider NWF a party to the appeal. See The Wilderness Society, 110 IBLA 67, 71-72 (1989). Nevertheless, we will accord NWF status as amicus curiae and consider its arguments in our resolution of the appeal to the extent that they expand upon arguments previously made by KCAR. See David J. Collings, Jr., IBLA 93-2, Order of Feb. 11, 1993. The motion to disregard briefs filed by NWF is denied. See George R. Schultz, 85 IBLA 77, 88-89, 92 I.D. 83, 89 (1985), rev'd sub nom. Webb v. Hodel, No. C-85-1293-J (D. Utah May 7, 1987); see also United States v. United States Pumice Co., 37 IBLA 153, 160-61 (1978).

[2] Section 302 of the Federal Land Policy and Management Act of 1976 (FLPMA) requires that "in managing the public lands the Secretary shall, by regulation or otherwise, take any action required to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b) (1988); see also 43 U.S.C. § 1732(2)(c) (1988). In addition, NEPA requires BLM to prepare an EIS if approval of a proposed action constitutes a major Federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (1988). In most cases, the determination whether to prepare an EIS is made by preparing an EA. See 40 CFR 1501.4; 516 DM 2.3. The surface management regulations promulgated under section 302 also require that an EA be prepared for a plan of operations in order "to identify the impacts of the proposed operations on the lands and to determine whether an environmental impact statement is required." 43 CFR 3809.2-1(a). They further require that the EA be used "to determine the adequacy of mitigating measures and reclamation procedures included in the plan to insure the prevention of unnecessary or undue degradation of the land." 43 CFR 3809.2-1(b).

The relation between BLM's duty to determine whether significant impacts are likely to occur and its responsibility to prevent unnecessary

and undue degradation was discussed in Nez Perce Tribal Executive Committee, 120 IBLA 34 (1991):

BLM employs the National Environmental Policy Act (NEPA) process to evaluate both whether a proposed mine plan of operations entails significant effects on the environment and whether mitigation measures are required to prevent unnecessary or undue degradation of the public lands. 43 CFR 3809.2-1. Of course, the consequences of the two determinations differ. The fact that a proposed mine plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause significant environmental effects that would require preparation of an environmental impact statement. See Southwest Resource Council, 96 IBLA 105, 120-21, 94 I.D. 56, 64-65 (1987); 45 FR 78902, 78905 (Nov. 26, 1980). If there are significant environmental effects that cannot be mitigated, an EIS must be prepared even if there is no unnecessary or undue degradation of the public lands. 42 U.S.C. § 4332(2)(C) (1988). If there is unnecessary or undue degradation, it must be mitigated. See 43 CFR 3809.2-1(b). If unnecessary or undue degradation cannot be prevented by mitigating measures, BLM is required to deny approval of the plan. 43 CFR 3809.0-3(b); Department of the Navy, 108 IBLA 334, 336 (1989). See 43 U.S.C. § 1732(b) (1988); 43 CFR 3809.0-5(k). [Footnote omitted.]

Id. at 36.

The record in the present case establishes that BLM personnel actively reviewed the proposed EA prepared by DSL and contributed to the final EA. It does not, however, show that BLM met its responsibilities under NEPA.

In preparing an EA, BLM must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that the potential environmental impacts are insignificant in order to support a conclusion that an EIS is not required. Idaho Natural Resources Legal Foundation, Inc., 115 IBLA 88, 90-91 (1990); Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 38 (1987). If the proposed action will result in significant environmental impact, an EIS must be prepared to review any impacts in detail, unless the proposed action is modified or sufficient mitigation measures are provided to prevent the impact from being significant. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982); Glacier-Two Medicine Alliance, 88 IBLA 133, 148 (1985); D. Mandelker, NEPA Law & Litigation, § 8:55 (1984).

The decision at issue states that BLM determined that the revised plan of operations "is adequate to prevent unnecessary and undue degradation" but does not mention whether BLM also found there would be no significant environmental impact. Similarly, the EA notes that BLM is responsible for preventing unnecessary or undue degradation, but mentions environmental review only in relation to DSL's responsibilities under the Montana Environmental Policy Act (EA at 4).

[3] We do not hold that BLM should have prepared the EA or a separate EA. Cooperation with state agencies is contemplated under NEPA. See 40 CFR 1500.4(n) and 1506.2. The Act does not require duplication of effort, but rather encourages reference to and reliance upon prior environmental review and review conducted by others. See 40 CFR 1501.5 and 1501.6 (lead and cooperating agencies), 1502.20 and 1508.28 (tiering), 1502.21 (incorporation by reference), and 1506.3 (adoption). 3/ Similarly, the surface management regulations provide for joint Federal-State programs for administration and enforcement. 43 CFR 3809.0-2(c) and 3809.3-1. An EA prepared by a State agency, as was done by DSL in this case, can certainly be relied upon by

BLM in meeting the requirements of NEPA, but BLM must independently evaluate the EA prior to approval and adoption. 42 U.S.C. § 4332(2)(D)(iii) (1988); Sierra Club, Inc., 92 IBLA 290, 303 (1986); see "National Environmental Policy Act Handbook," BLM Manual, H-1790-1 (Rel. Oct. 25, 1988) at III-6, III-8. The record simply fails to establish that BLM did so here.

BLM may have reviewed the final EA and made a tacit finding that significant impacts would not occur (BLM Answer at 3, 5; BLM Response at 2). However, the decision does not mention the matter, and, more importantly, the record does not show BLM critically reviewed the final EA in relation to the amended plan of operations, took a hard look at the relevant areas of environmental concern, considered the proposed mitigation measures, and independently reached a reasoned conclusion that significant impact will not occur. It is essential that BLM make its environmental review as a matter of record and detail its findings in a decision record.

BLM's decision is also deficient because BLM did not review the six stipulations added by DSL in approving the amendment on November 1, 1989. Where a FONSI is predicated on restrictions on a project to minimize environmental impact, NEPA requires an analysis of the proposed mitigation measures and how effective they would be in reducing the impact to insignificance. Nez Perce Tribal Executive Committee, supra; Idaho Natural Resources Legal Foundation, Inc., 115 IBLA at 91.

One consequence of the lack of documentation of BLM's review of the final EA is that the arguments raised on appeal about its sufficiency are

3/ The documents relied upon must, of course, be made part of the record. We note that the EA states that the "initial Preliminary Environmental Review and subsequent environmental review documents (DSL, 1988; DSL, 1989 a, b) written as a result of the amendment applications are incorporated by reference" (EA at 1) but copies are not part of the record filed with the Board. We presume they also were not part of BLM's review leading to the decision on appeal. Reliance upon outside documentation is also limited by NEPA's requirement of independent review. Consequently, a plan of operations may not be relied upon as providing required environmental analysis, although information from it may be summarized, appended, or referenced and made part of the EA if the source is identified with specificity. See Southern Utah Wilderness Alliance, 123 IBLA 302, 307 (1992) (EA not tiered to EIS when issues discussed in EIS not summarized or specific portions of EIS identified).

addressed to a document prepared and issued by DSL, a State agency over which we have no review authority. Were we to agree with KCAR that the EA is deficient, we could not instruct the State to undertake further work to revise the document or require that mitigation measures be developed and stipulations added to assure compliance. See, e.g., Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 141 (1992), appeal filed, Pardee Construction Co. v. Lujan, No. CV-S-92-978-LDG-RLH (D. Nev. Nov. 20, 1992); Sierra Club, Inc., supra at 305-06. Our concern is whether BLM complied with NEPA. Absent joint authorship of the EA, express adoption of its facts, reasoning and conclusions, or a record documenting BLM's independent review and FONSI, we must conclude it has not.

[4] Much the same problem arises in reviewing BLM's conclusion that approval of the revised plan of operations will not cause unnecessary or undue degradation. Although many factual issues, mitigation measures, and reclamation requirements may be the same as under NEPA, review to determine whether unnecessary or undue degradation will occur is different. The term is defined to mean:

[S]urface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations.

43 CFR 3809.0-5(k). This definition requires BLM to consider, in relation to operations of similar character, the extent of surface disturbance and the effects on resources and land uses both within and outside the area of operations. Unlike the review required by NEPA, the question is not whether environmental impacts will be significant, but whether the impacts which will occur will result in unnecessary or undue degradation compared to similar operations. A finding that there will be not be significant impact does not mean either that the project has been reviewed for unnecessary and undue degradation or that unnecessary or undue degradation will not occur. See Nez Perce Tribal Executive Committee, supra at 36.

In this case BLM's conclusion was based on its review of the final EA. That document, however, does not discuss operations of similar character or their effects on resources and land uses. ^{4/} Nor, for that matter, does the

^{4/} The requirement to address "operations of similar character" does not require that a plan of operations be reviewed in relation to other specific mining operations. A plan also could be examined in relation to industry standards for the type of operation, regulatory standards governing the type of operation, or other standards which allow a meaningful determination whether the effects of the proposed plan are unnecessary or undue. For example, the Environmental Handbook for Cyanide Leaching Projects prepared by Radian Corporation for the National Park Service in June 1986, provides information pertaining to effects on land and resources as well as NEPA related environmental impact issues.

EA discuss the impacts of KV's operation on resources and land uses outside the permit area, except indirectly in considering issues such as water quality and quantity (EA at 48-54) and noise (EA at 61). While we do not agree with KCAR that BLM is required by 43 CFR 3809.0-2(c) to prevent unnecessary or undue degradation to all land (the provision speaks only to coordination with State agencies), BLM's review must consider potential effects to other public land and not just the land within the permit boundary. The master title plats and other maps which are part of the record indicate there are public lands adjacent to and in the vicinity of the permit area. Additionally, although the EA notes that "[a]pproximately 40 acres of BLM-managed surface would be disturbed by the applicant's proposed mine expansion" (EA at 1), other Federal land lies within the permit area.

BLM's participation in preparation of the EA is not a sufficient basis to establish that the EA represents BLM's analysis of whether the operation will cause unnecessary or undue degradation. To the extent FLPMA section 302 and the surface management regulations impose additional obligations upon BLM, the record must show that the Bureau conducted the required review and came to reasoned conclusions. The EA would be an appropriate place to present such analysis but, as discussed, the EA in this case

does not do so, probably because in preparing the EA, DSL understood that BLM was responsible for considering whether the amended plan would cause unnecessary or undue degradation to public lands and, accordingly, did not address the matter. BLM has not done so in a separate document. Therefore, we must conclude that the record does not support BLM's decision that the amended plan of operations was adequate to prevent unnecessary and undue degradation.

[5] KCAR also challenges BLM's determination that the plan of operations is in compliance with the ESA. KCAR relies on a letter from the Montana Department of Fish, Wildlife and Parks submitted in response to

the draft EA which states in part: "Bald eagles are known to winter in the vicinity. They are carrion feeders in this area during the winter and any sick or dead wildlife resulting from mining or leaching activities will be used by Bald Eagles. This then may jeopardize the health of individual eagles" (NWF SOR, Exh. 8). KCAR and NWF criticize the amended plan and EA for failing to address potential dangers to bald eagles and for not consulting with the U.S. Fish and Wildlife Service (FWS) (KCAR SOR at 3, NWF SOR at 9). In response KV and BLM point to the statement in the EA that "[n]o federally listed threatened or endangered species were observed in either the 1984 or 1988 surveys" (EA at 42) and a wildlife study accompanying the plan of operations (EA at 42; KV Answer at 17; BLM Answer at 11). Relying on Upper Mohawk Community Council, 104 IBLA 382 (1988), BLM also argues that it is not required to consult with FWS when it determines that neither a threatened or endangered species nor its habitat will be affected (BLM Answer at 11 n.1). In response, KCAR and NWF argue that Upper Mohawk is contrary to the ESA and they assert that consultation with FWS is required because the amended plan of operations is a "major construction activity" (KCAR/NWF Response at 17-18).

The ESA requires that Federal agencies "in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined * * * to be critical." 16 U.S.C. § 1536(a)(2) (1988). It further requires Federal agencies to "confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed * * * or result in the destruction or adverse modification of critical habitat proposed to be designated for such species." *Id.* § 1536(a)(4). Although these duties apply to BLM, the Board has held in a number of cases that neither the ESA nor regulations "require consultation, unless requested by FWS, if BLM determines that its activities will not affect listed species or their habitat." Southwest Resource Council, Inc., 73 IBLA 39, 49 (1983). The rulings derive from the statute's reference to the Secretary and the fact BLM is part of the Department he administers. See Oregon Natural Resources Council, 115 IBLA 179, 185 (1990). More practically, in at least some instances BLM furnishes FWS the information necessary to compile the list of threatened and endangered species for the area. See In re Letz Boogie Timber Sale, 102 IBLA 137, 142-43 (1988).

A finding that an action will not jeopardize any listed or proposed, endangered or threatened species or their habitat must be a reasoned conclusion based on facts, and, as with the other matters we have addressed, the record in this case does not identify the basis of BLM's determination. Nor is the EA a sufficient basis. Its sole statement on the matter derives from the wildlife study submitted with the plan of operations (AOP, App. A at 34). That study was in turn based on 19 hours of field work during September 28-30, 1988, and review of a prior study conducted in 1984, both of which the report acknowledges were "comparatively short" and did not occur during the proper seasons to monitor nesting raptors (AOP at 2, 8, 28). The absence of evidence of endangered or threatened species during that visit does not support BLM's finding that KV's plan of operations would not jeopardize any listed or proposed, endangered or threatened species or habitat. Such a conclusion must, at a minimum, be based upon broader information, presumably available from BLM's biologists and wildlife specialists, particularly those familiar with the area. KV's plan of operations may have been reviewed by BLM's wildlife specialist (BLM Answer at 11), but there is no indication that the review addressed ESA compliance. 5/

We have been informed that KV has sought and obtained DSL's approval of an additional amendment of its plan of operations. In general, that amendment draws in sections of the permit boundaries and reduces the scale of

5/ KCAR's and NWF's argument that consultation with FWS is mandatory for a "major construction activity" arises from section 7(c) of ESA, which requires Federal agencies, "with respect to any agency action of such agency for which no contract for construction" had been entered into prior to enactment of the ESA, to "request of the Secretary information whether

most aspects of the operation set forth in the plan at issue in this appeal. Because KV's operation has changed, no purpose would be served in instructing BLM on remand to review the final EA and amended plan of operations and prepare the record which is now lacking. The ultimate problem in the appeal before us, however, is not that the record is deficient but that KV is operating on Federal land without a Federally approved plan of operations. 43 CFR 3809.1-4. 6/ Therefore, on remand, following the procedural guidelines spelled out herein, BLM shall review KV's current operation for the purpose of assuring that it is presently in compliance with all relevant statutory and regulatory provisions.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the October 31, 1989, decision of the Lewistown District Manager is set aside and remanded.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge

fn. 5 (continued)

any species which is listed or proposed to be listed may be present in the area of such proposed action." 16 U.S.C. § 1536(c)(1) (1988); see 50 CFR 402.12(c). A biological assessment is required for "major construction activities." 50 CFR 402.12(b). As noted in Upper Mohawk Community Council, supra at 388, the term is defined to mean "a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment" as referred to in NEPA. 50 CFR 402.02. We have set aside BLM's conclusion that approval of the amended plan of operations will not cause significant environmental impact. If BLM determines otherwise on remand, it should consider whether it must comply with the requirements of 50 CFR 402.12(b).

6/ See note 1, supra.